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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

BJORN REDDINGTON and KATHLEEN
REDDINGTON,

Plaintiffs and Appellants,

v.

COUNTY OF SANTA BARBARA,

Defendant and Respondent.

2d Civil No. B218196
(Super. Ct. No. 1265939)
(Santa Barbara County)

Bjorn Reddington and his wife, Kathleen Reddington, appeal from the summary judgment granted in favor of County of Santa Barbara (County) on their first amended complaint for dangerous condition of public property. (Code Civ. Proc., § 437c; Gov. Code, §§ 835, 835.2.) The trial court ruled that the action was barred by the design immunity provisions of Government Code section 830.6.¹ We affirm.

Facts and Procedural History

Bjorn Reddington suffered serious injuries riding a bicycle around a curve on Greenwell Avenue in Summerland on January 18, 2007. He was struck by a white vehicle traveling on the wrong side of the road.

¹ All statutory references are to the Government Code unless otherwise stated.

Moments before the accident, Bjorn and his wife, were descending Greenwell Avenue where it intersects Asegra Road and curves southbound. They had traveled the route 30 times. Before reaching the curve, Bjorn pulled ahead and warned his wife to "Tuck in tight and be careful," i.e., stay close to the side of the road.

Bjorn has no recollection of the accident but claims that a white vehicle hit him, catapulting him over the bicycle handlebars onto the road. Kathleen was about half a mile back and did not see the collision.

Appellants sued County based on the theory that Greenwell Avenue was "a trap" for motorists and cyclists due to the radius of the curve, overgrown shrubs, the absence of warning signs, and because a "K-rail" barrier allegedly forced on-coming traffic onto the wrong side of the road.

County moved for summary judgment based on the design immunity statute. (§ 830.6.) It was undisputed that a landslide covered Greenwell Avenue during the 2004/2005 winter rains. County reopened Greenwell Avenue in March 2005 after it installed a K-rail to contain the landslide debris, paved a single lane around the K-rail, and set up a traffic control zone with stop signs and no parking signs. Because it was a rural road, County planned to keep the lane in place indefinitely until the landslide and road were permanently repaired in a separate project. After the K-rail lane was installed, there were no reported accidents and 260,000 to 325,000 vehicles drove through the landslide site.

Appellants opposed the summary judgment with expert declarations that Greenwell Avenue could have been safer had County installed caution signs and painted a centerline. Appellants argued that design immunity did not apply to a road opening in response to an emergency.

The trial court granted summary judgment, ruling that the road reopening project was a construction of public property within the meaning of section 830.6. It was undisputed that the project was completed 18 months before the accident and that County, in approving the project design, considered traffic controls, the proximity of the K-rail lane to the curve, and line of sight guidelines.

Discussion

Appellants argue that the appeal addresses a narrow issue: whether the design immunity statute applies to temporary, emergency measures taken by a public entity after a landslide covers a road. We review the order granting summary judgment de novo. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.)

Section 835, subdivision (b) provides that a public entity is liable for injury proximately caused by the dangerous condition of its property if the dangerous condition created a reasonably foreseeable risk, and the public entity had actual or constructive notice of the condition a sufficient time before the injury to have taken preventative measures. (*Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 68 (*Cornette*)). Even if the plaintiff shows a dangerous condition of public property, the action may be barred by section 830.6 design immunity where: (1) there is a causal relationship between the project plan or design and the accident; (2) there was discretionary approval of the plan or design prior to construction; and (3) substantial evidence supports the reasonableness of the plan or design. (*Id.*, at p. 69.)

Appellants contend that the project was an emergency response to the landslide and not "a construction of, or an improvement to, public property" within the meaning of section 830.6 which provides: "Neither a public entity nor a public employee is liable under this chapter for an injury caused by the *plan or design of a construction of, or an improvement to, public property* where such plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved, if the trial or appellate court determines that there is any substantial evidence upon the basis of which (a) a reasonable public employee would have adopted the plan or design or the standards thereof or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor." (Emphasis added.).

The contention is based on *Winig v. State of California* (1995) 37 Cal.App.4th 1772 (*Winig*) which holds that design immunity does not apply to harm caused by a temporary dangerous condition during the construction of a public improvement. There, truck passengers were injured at a project site in which the State was installing a highway median barrier and widening the median shoulder. The Court of Appeal concluded that design immunity did not apply because the dangerous condition was temporary and arose during the course of construction. (*Id.*, at p. 1777.) "The risks inherent in the static design alternatives of a finished fixed installation are different in kind and generally more limited and foreseeable than those which arise in the fluid process of construction." (*Ibid.*) Stated another way, design immunity does not extend to a dangerous condition temporarily arising during construction before the project is finished. (*Ibid.*; Van Alstyne, Cal. Government Tort Liability Practice (4th ed. Cont.Ed.Bar 2009) § 12.69, p. 954.)

Appellants argue that the K-rail lane was temporary. This is refuted by County's declarations that the K-rail lane and traffic controls were intended to remain indefinitely until the landslide and road were permanently repaired in a separate project. Such a project had to be prioritized because Greenwell Avenue was one of 150 road sites damaged by the 2004/2005 winter storms.

After the County Board of Supervisors issued an emergency declaration in response to widespread storm damage, County engineers performed a safety assessment of the landslide and road. County Civil Engineer Specialist Charles Ebeling inspected the landslide, and designed a plan to reopen Greenwell Avenue with a K-rail barrier and paved lane with traffic control devices. Ebeling stated: "The K-rail barrier and accompanying traffic control zone constituted an emergency road opening project that would remain in place indefinitely until the landslide and road damage were repaired permanently. Given the large number of other storm-related repair sites in the County road system, I anticipated that the K-rail and traffic control would probably remain in place for at least several months before the landslide repair project could start. The

landslide repair is a separate project from the emergency opening." The project was approved.

County Civil Engineer Manager Christopher Sneddon stated that he and Ebeling discussed the project design, that he supervised the road reopening project, and that applicable traffic control and design standards were used. Sneddon stated: "It was my understanding that the K-rail project and accompanying traffic control zone would be temporary in the sense that they would be removed when the landslide and road damage were repaired. The K-rail barrier and traffic controls were intended to remain in place until the landslide and road were permanently repaired."

In granting summary judgment, the trial court said: "Although Mr. Sneddon avers that it was his understanding that the K-rail controls would be 'temporary in the sense that they would be removed when the landslide and road damage were repaired,' the Court is satisfied that once completed, they [i.e., the K-rail controls] constituted construction of public property."

Section 830.6, applies to both the construction of public property and improvements to public property. We reject the argument that design immunity does not apply to a road opening project after a landslide. In *Alvis v. County of Ventura* (2009) 178 Cal.App.4th 536, a pile lagging wall was constructed next to a road after a 1995 landslide buried houses and 250 linear feet of road. County approved construction of the wall to reopen the road, using Federal Emergency Management Agency (FEMA) funds. "The FEMA category under which funding for the wall was approved [was] for emergency measures" and "FEMA intend[e]d such emergency measures to be temporary." (*Id.*, at p. 540.) Four years after the wall was built, a large landslide toppled the wall, killing 10 people and destroying 16 homes. Decedents' heirs sued for wrongful death based on the theory that county's failure to drill weep holes and horizontal drainpipes in the wall created a dangerous condition and altered the course of the mud, soil, rocks, and debris. (*Id.*, at p. 542.) We affirmed the grant of summary judgment for county on the ground the action was barred by the design immunity statute. (*Id.*, at p. 549-554.)

Here, the K-rail lane and traffic controls were all part of a completed project to reopen the road. Unlike *Winig*, there are no triable facts that the accident occurred during construction, before the project was finished. It is undisputed that the K-rail lane and traffic control zone were designed and built as a road opening project, to remain indefinitely until County permanently repaired the landslide and road in another project. (Undisputed Facts 55-57.) Appellants stipulated that the permanent repair of the Greenwell Avenue landslide was a separate project yet to begin (Undisputed Fact 58), and that the K-rail barrier, pavement markings, and traffic control devices were constructed in March 2005 and remained in place unchanged (Undisputed Fact 59). It was also undisputed that K-rail design was reasonable and conformed to applicable guidelines. (Undisputed Facts 62-63.)

Like the trial court, we must utilize common sense when drawing inferences from undisputed facts. (*See e.g., Visueta v. General Motors Corp.* (1991) 234 Cal.App.3d 1609, 1615.) The road opening project was completed 18 months before the accident based on an approved design. The project, as approved, includes diagrams of the K-rail lane, traffic controls, and stop signs, and line of sight photos from the curve to the K-rail. The project was well planned and not a temporary fix, with yellow caution tape and traffic cones.

Appellants cite no authority, and we have found none, that a road reopening project in response to a landslide does not qualify for design immunity. As discussed in *Winig*, section 830.6 applies to both "'a construction of . . . public property' and 'an improvement to, public property'. . . . Presumably the duality ensures that the scope of the immunity extends to the broadest usage of the terms and to ensure that it is applied both to an original construction and any subsequent improvements. [¶] Similarly 'plan' and 'design' are often synonymous and the duality [in section 830.6] avoids the possibility that a narrow denotation of either term could constrict the reach of the immunity." (*Winig, supra*, 37 Cal.App.4th at p. 1777, fn. 3.)

Here, the road reopening project, once completed, constituted a construction of public property within the meaning of section 830.6. County intended to permanently repair the landslide and road as a separate project at a later unspecified date. It should not be penalized because it decided to reopen the road based on an approved plan using a K-rail barrier and traffic control devices. .

Reasonableness of Improvement

Appellants do not dispute that County established the first and second elements of design immunity, i.e., that the project design caused appellants' injuries and discretionary approval of the design prior to construction. (*Cornette, supra*, 26 Cal.4th at p. 66.)

The third element – substantial evidence supporting the reasonableness of the design - is a legal issue for the court to decide. (*Id.*, at p. 72; *Weinstein v. California Department of Transportation* (2006) 139 Cal.App.4th 52, 58.) Section 830.6 does not require that the road reopening project be perfectly designed, only that it be given a design which is reasonable under the circumstances. "By deciding on a 'reasonableness' standard, the Legislature intended that government officials be given extensive leeway in their decisions concerning public property." (*Ramirez v. City of Redondo Beach* (1987) 192 Cal.App.3d 515, 525.)

County presented substantial evidence that the project design, as approved and implemented, was reasonable and conformed with applicable guidelines for signs, signals, markings, line of sight requirements, and devices to regulate, warn and guide traffic. Although appellants claim that the design immunity was lost due to the growth of foliage, appellants did not plead negligence. The first amended complaint states that the foliage exacerbated the dangerous condition and "took years to grow to its accident status." County Traffic Operations Supervisor Gary Smart declared that he drove the curve several times at various speeds to determine whether the line of sight conformed to applicable guidelines. The trial court drew the inference that Smart considered the foliage and line of sight restrictions in approving the design. This was confirmed by

County's expert, Kenneth C. Berner, who stated the foliage is one of the factors considered in approving a road design.

"The issue is not whether the trial court or jury could find the design unreasonable based on conflicting evidence, but whether there is *any* reasonable basis on which a reasonable public official could initially have approved the design. . . . [¶] Thus, as long as there as there was any substantial basis on which a government official could have decided the design was reasonable, it is irrelevant that a contrary opinion might have been offered. [Citation.]" (*Compton v. City of Santee* (1993) 12 Cal.App.4th 591, 597.)

Appellants claim that warning signs or the use of a center line would have prevented the hit-and-run driver from speeding up the wrong side of the road. County is only required to make its property safe for reasonably foreseeable careful use. (*Mathews v. City of Cerritos* (1992) 2 Cal.App.4th 1380, 1384.) " 'It would be illogical to hold that a public entity immune from liability because the design was deemed reasonably adoptable, could then be held liable for failing to warn that the design was dangerous.' [Citation.]" (*Weinstein v. Department of Transportation, supra*, 139 Cal.App.4th at p. 61.)

The judgment (order granting summary judgment) is affirmed. County is awarded costs on appeal.

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YEGAN, Acting P.J.

We concur:

COFFEE, J.

PERREN, J.

Thomas P. Anderle, Judge
Superior Court County of Santa Barbara

McNicholas & McNicholas; Matthew S. McNicholas, M. Benjamin Valerio
and Juan C. Victoria, for Appellants.

Dennis Marshall, County Counsel, County of Santa Barbara and Michael
M. Youngdahl, Deputy, for Respondent.